No. 89-826

In The

Supreme Court of the United States

October Term, 1989

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, a California corporation,

Petitioner,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Seven

BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation submits this amicus curiae brief in support of

petitioner's petition for writ of certiorari. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit foundation, incorporated under the laws of California for the purpose of participating in litigation that affects the public interest. An independent Board of Trustees composed of concerned citizens, a majority of whom are attorneys, authorizes participation in a case only when it concludes that PLF's position has broad public support. The Board of Trustees has authorized PLF's involvement in this case.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW

In its 1987 decision, this Court ruled that monetary compensation is mandated by the Constitution when regulation takes private property, even if the taking is only temporary. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

Due to the absence of a factual record (the case having come up on a dismissal of pleadings) the Court left undecided the question of whether First English Church's property was in fact taken by the Los Angeles County flood control ordinance. For the same reason the Court noted it had no occasion to decide whether the county might avoid a taking conclusion by establishing that a denial of all use is insulated under the Fifth Amendment as a part of the state's authority to enact safety regulations. *First English*, 482 U.S. at 313.

The latter question involves not only issues of fact, but also an extremely important question of law, namely: Can government deny *all* use of an owner's property, if done to protect public safety, without compensating the owner? Because a factual record has not yet been developed in the case, this Court properly refrained from offering an advisory opinion on the issue. The California Court of Appeal on remand, however, did not feel so restrained and, despite the same lack of a factual record, took it upon itself to answer this weighty question. The Court of Appeal has announced that government can indeed, consistent with the Fifth Amendment, deprive an owner of all use of his property to promote public safety, and the owner must bear that loss uncompensated.

As an "independent" ground for its decision, the Court of Appeal also ruled that the temporary denial of use imposed by the county was lawful because it was not unreasonably long, "even were we to assume its restrictions were too broad if *permanently imposed*." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1372 (1989) (emphasis in original). In so ruling, the Court of Appeal adopts the view of the *dissent* in this Court's 1987 decision.

The *First English* case is one of high visibility, and the Court of Appeal's opinion will be widely read by government officials and attorneys who must advise clients in this area of the law. In regulation-happy California, the uncertainty brought about by this decision can lead to further eroding of constitutionally protected property rights and to protracted litigation and legal costs associated therewith. The issues are too important to be

decided without the guidance of this Court, and this Court is therefore respectfully urged to grant the petition.

SUMMARY OF ARGUMENT

1. The California Court of Appeal erred by ruling that no taking had occurred when it had no evidentiary record upon which to conduct the constitutionally mandated "ad hoc, factual inquiry" courts must undertake in takings cases.

2. The Court of Appeal in deciding the major issue of whether a denial of all use, done to promote public health and safety, nonetheless requires compensation—an issue this Court left for another day—decided the issue in conflict with this Court's precedents.

3. The Court of Appeal rejected this Court's ruling that a denial of use, which would constitute a taking were it permanent, is no less a taking just because it is temporary.

ARGUMENT

I

TAKING CLAIMS CANNOT BE DECIDED WITHOUT A FACTUAL RECORD

The Court of Appeal took it upon itself to determine whether First English Church had suffered a taking without ever giving the church an opportunity to conduct discovery or put on evidence. That was a significant legal error. This Court has consistently described the review which courts

must undertake in takings cases as an "ad hoc, factual inquiry." *See, e.g., Pennell v. City of San Jose*, 485 U.S. ___, 99 L. Ed. 2d 1, 13 (1988); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 294-95 (1981); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

It is of course stating the obvious to say that a factual record is not developed in the Court of Appeal. It is developed in the trial court, where there is an opportunity to conduct discovery, subpoena records, examine witnesses, introduce evidence, object to evidence, put on experts—in short, a chance for each side to prove its case.

The importance of a thorough factual record was discussed by this Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). In *Goldblatt*, this Court upheld the New York ordinance at issue, but only after the property owner had been given opportunity to and failed to develop an evidentiary record showing that the ordinance was not reasonably necessary for public safety. The Court said:

> " 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'
>
> . . . .
>
> "The ordinance in question was passed as a safety measure, and the town is attempting to

> uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." *Goldblatt*, 369 U.S. at 594-95.

The quoted language obviously demonstrates that, had there been facts in the trial court record to show that no viable use remained for the property, or that the ordinance was overbroad, or that less restrictive alternatives were available, the Court might well have reached a different result. As stated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 127:

> "It is, of course, implicit in Goldblatt that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property."

Issues of reasonableness and impact on use are issues of fact. The lack of an evidentiary record at the present pleading stage of this case caused this Court to conclude that it could not determine whether a taking had in fact occurred. *First English*, 482 U.S. at 313. The California Court of Appeal was no better equipped to make that determination. As stated in *Goldblatt*, the court would need to know such things as the nature of the menace against which the Los Angeles County ordinance was supposed to protect, and the availability of other less drastic protective steps. The court simply had no evidence on matters such as the probability of another similar flood, whether the upstream watershed could be

revegetated, whether perhaps it had already become revegetated, whether the church's full 21 acres were subject to flooding, whether the church's land could be graded so as to elevate some of the acreage above the flood plain, and whether buildings could be designed to withstand flooding.

The Court of Appeal also had no evidence to explain why, if the county was concerned about loss of life on the church's property, it prohibited buildings, but not people. In the Court of Appeal's own words, the ordinance "does not even prevent occupancy and use of any structures which may have survived the flood. It only prohibits the reconstruction of structures which were demolished . . . and the construction of new structures. . . . [M]any camping activities could continue on this property. Meals could be cooked, games played, lessons given, tents pitched." *First English*, 210 Cal. App. 3d at 1367.

In addition, the Court of Appeal had no evidence to explain why, if the county was concerned about debris that could be carried away in a flood, it prohibited even flood-engineered buildings, but would permit a parking lot full of unanchored cars on the flood plain. *See First English*, 210 Cal. App. 3d at 1370.

If given the chance, First English Church might be able to show that the county had simply seized upon the flood as a chance to further its growth control and environmental preservation goals for the Santa Monica Mountains.

In the absence of any evidence against which to weigh the reasonableness of the county's ordinance, this Court properly refrained from venturing an opinion

about whether the church's property had been taken. This Court returned the case to the state courts so that the church could have its day in court. The Court of Appeal should have sent the case on to the trial court. Unfortunately, when the spotlight of public attention was turned on the Court of Appeal, that court could not resist the temptation to make legal history by deciding those questions which this Court found itself unable yet to answer. The result of the Court of Appeal's action was to again deprive First English Church of its day in court. More importantly, in the absence of a factual record, the Court of Appeal erred in deciding the ultimate legal issue, that is, whether a denial of all use is lawful without compensation if done in the name of public health and safety.

II

A COMPLETE DENIAL OF ALL USE REQUIRES JUST COMPENSATION

The Court of Appeal seriously mischaracterized prior pronouncements of this Court when it concluded that "where health and safety are at stake," all use of private property can be denied without compensation. *First English*, 210 Cal. App. 3d at 1366. Although the court purports to rest its conclusions on Supreme Court precedents, including the majority opinion in *First English*, this Court has never so held and the precedents relied upon do not support this view.

The Court of Appeal completely misread this Court's *First English* opinion. The Court of Appeal asserts: "[T]he

Supreme Court majority clearly stated the land use regulation involved in this case . . . would *not* constitute a compensable 'taking' . . . even assuming it prohibited 'all uses' of that property if the deprivation . . . promoted public safety." 210 Cal. App. 3d at 1366 (emphasis in original). Far from "clearly stat[ing]" this view, the Supreme Court majority actually said it had "no occasion to decide" the issue. *First English*, 482 U.S. at 313.

This Court's opinion reflects that the county was proposing this view. However, the Court clearly indicated that consideration of the county's argument would not be appropriate in the absence of a factual setting making it necessary to do so. To quote the Court, "[w]e accordingly have no occasion to decide . . . whether the county *might avoid* the conclusion that a compensable taking had occurred *by establishing* that the denial of all use was insulated as a part of the State's authority to enact safety regulations." 482 U.S. at 313 (emphasis added).

Amicus is not aware of any decision of this Court holding that all use can be denied in the name of public health and safety without running afoul of the guaranty of compensation. To say that a regulation promotes health or safety is merely to say that the regulation advances a legitimate state interest. This Court has always held, however, that finding a legitimate state interest does not end the taking inquiry. "It is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

Besides *First English*, the only other case the Court of Appeal looks to as support for its theory is *Mugler v. Kansas*, 123 U.S. 623 (1887). *Mugler*, a nuisance case, like all this Court's nuisance cases, does not involve facts where all use of private property was denied. The defendant, Mugler, while prevented from using his property as a brewery, was free to put it to any of a host of other lawful uses. Moreover, *Mugler* was the first of a long line of cases to hold that a compensable taking occurs when either the government's action does not substantially advance a legitimate purpose *or* the owner is denied all reasonable use of his property:

> "It does not at all follow that every statute enacted ostensibly for the promotion of [public health and safety] ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, *or* is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler*, 123 U.S. at 661 (emphasis added).

This rule has been oft repeated. In *Pennsylvania Coal Co. v. Mahon*, the Court indicated that a denial of all reasonable use, by itself, would constitute a taking when it wrote: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). In *Agins v. City of Tiburon*, the Court stated that a taking occurs "if the ordinance does not substantially advance legitimate state interests . . . *or*

denies an owner economically viable use of his land." 447 U.S. 255, 260 (1980) (emphasis added). In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, the Court wrote: "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'" 452 U.S. at 295-96. In *Kirby Forest Industries, Inc. v. United States*, the same language is used again: "Thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived 'an owner [of] economically viable use of his land.'" *Kirby* refers to this rule as one this Court has "frequently recognized." 467 U.S. 1, 14 (1984). In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Court assumes that compensation would be owing if, after a final decision by the municipality, "the jury would have found that the respondent had been denied all reasonable beneficial use of the property." 473 U.S. 172, 191 (1985). Recently, in *Nollan v. California Coastal Commission*, this Court affirmed the rule with these words: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' *and* does not 'den[y] an owner economically viable use of his land.'" 483 U.S. 825, 834 (1987) (emphasis added). Perhaps most significant for purposes of the present case is the use of this "either/or" analysis by the Court in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). There the Court found that the Pennsylvania subsidence statute substantially advanced the same state interest at stake in *First English*, namely the preservation of human life. Nonetheless, it went on to consider whether the statute deprived the coal companies of the

economically viable use of their land. *Keystone*, 480 U.S. at 493.

It is readily seen from the above list that this Court has repeatedly held, contrary to the announcement of the California Court of Appeal, that even when regulation is justified by concerns for public health and safety, the owner must either be left with some economically viable use, or be paid compensation. Astonishingly, the Court of Appeal refers to this rule as just the opinion of "[o]ne pair of commentators." *First English*, 210 Cal. App. 3d at 1365.

The Court of Appeal misinterpreted a full century of this Court's jurisprudence when it ruled that all use can be denied for public health or safety reasons without compensation. The court did not stop there, however. As an alternative ground for its decision, it went on to reject this Court's holding, in this very case, that a temporary taking is no less compensable than a permanent one.

III

TEMPORARY TAKINGS ARE COMPENSABLE

In its 1987 decision this Court held that temporary deprivations of use "are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318. The Court of Appeal, however, holds that "the interim ordinance did not constitute a 'temporary unconstitutional taking' even were we to assume its restrictions were too broad if *permanently imposed*." *First English*, 210 Cal. App. 3d at 1372 (emphasis in original).

This Court held that temporary delays on the ability to use property are excusable if "normal," and cited as examples the time needed to process requests by the owner such as building permit applications and zoning change requests. *First English*, 482 U.S. at 321. The Court of Appeal, however, excuses delays that are years long, and—far from accommodating some request by the owner—are intended to tie the owner's hands while the government ponders how much it will pare his property rights back, so long as these delays do not strike the court as "unreasonable."

This Court's contrast of the denial of use suffered by First English Church on the one hand, and normal delays to process land use applications on the other hand, reveals this Court's thinking that the purpose for a delay, not just its length, determines whether it constitutes a taking. If a denial of use is for a confiscatory purpose, then it is a taking without regard to its length.[1] Thus the court must look at the governmental purpose involved. An ordinance passed to prohibit all use is different from the delay of a particular proposed use. If the public objective is to keep the land unused, rather than to regulate its use, that is a confiscatory purpose and should be regarded as a taking even if the length of time involved might be regarded as normal or reasonable in another context.

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[1] Even if the delay is for a nonconfiscatory purpose, it may still cause a taking if left in effect an abnormally long time. But one does not get to this step if the public purpose is confiscatory.

The Court of Appeal rejected this idea and ruled that, regardless of the confiscatory or nonconfiscatory nature of the county's ordinance, if it was passed for health and safety reasons, and was not "unreasonably" long, it could not be a taking. The Court of Appeal is mistaken, if not defiant, and should be overruled.

CONCLUSION

Since the California Court of Appeal has committed major errors interpreting the rights guaranteed to the petitioner by the federal Constitution, which will affect property owners throughout the state if not reversed, this Court is urged to grant the petition for certiorari.

DATED: December, 1989.

Respectfully submitted,

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